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CPLR 8012(b): Sheriff Held Entitled To Full Poundage Fee When He Delayed Collection Upon Request

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Insurance Co. v. Keane,¹⁸⁸ which held that ordinary mail fulfills the purpose of CPLR 7503 absent any claim or proof of prejudice.

Allstate, properly applying the doctrine of estoppel in accordance with well-settled principles,¹⁸⁹ precludes a morass of technical obstructions to the arbitration procedure. Additionally, it is noteworthy that the Judicial Conference has recently proposed that the time period in CPLR 7503(c) be amended to allow twenty days in which to move for a stay of arbitration.¹⁹⁰

ARTICLE 80 — FEES

CPLR 8012(b): Sheriff held entitled to full poundage fee when he delayed collection upon request.

Under CPLR 8012(b), a sheriff's poundage fee is based upon a percentage of the amount actually collected.¹⁹¹ There are several exceptions to the general rule. Where there is a settlement after a levy, a sheriff is entitled to poundage based upon the value of the property levied on, but the amount obtainable cannot exceed the sum of settlement. Also, where an execution is vacated, a sheriff is entitled to poundage limited to the amount specified in the execution. A third exception applies where the sheriff has been hindered in the collection process.¹⁹²

In *Nevada Bank of Commerce v. 43rd Street Estates Corp.*,¹⁹³ the plaintiff instituted a tort action against the defendants, the guarantors of a debt of another Nevada corporation. The sheriff levied against certain assets of the corporate defendant which were sufficient to satisfy a default judgment of \$956,668. After the sheriff was urged not to take any further action, a Nevada bankruptcy proceeding led to a settlement which enabled the primary obligor to satisfy the debt owed to the plaintiff and thereby terminated the defendants' liability. Eventually, the plaintiff and the corporate defendant arranged a satisfaction and discharge of the attachment for a sum of \$1000. The issue of the case was which sum should be used in ascertaining the poundage fee of the sheriff — \$1000 or \$956,668.

¹⁸⁷ 69 Misc. 2d at 353, 329 N.Y.S.2d at 989.

¹⁸⁸ 157 N.Y.L.J. 43, March 6, 1967, at 21, col. 4 (Sup. Ct. Westchester County).

¹⁸⁹ See *Robinson v. City of New York*, 24 App. Div. 2d 260, 265 N.Y.S.2d 566 (1st Dep't 1965) and cases cited therein.

¹⁹⁰ JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 80 (1972).

¹⁹¹ For a general discussion of poundage fees, see 8 WK&M ¶ 8012.03-.09.

¹⁹² See *Flack v. State*, 95 N.Y. 461, 466 (1884); *Esselsteyn v. Union Sur. & Guar. Co.*, 82 App. Div. 474, 81 N.Y.S. 532 (2d Dep't 1903).

¹⁹³ 38 App. Div. 2d 227, 328 N.Y.S.2d 565 (1st Dep't 1972).

The Appellate Division, First Department, ruled that the poundage should be calculated on the basis of the amount received in the Nevada settlement. It reasoned that the sheriff would have satisfied the judgment in the absence of the request not to proceed.¹⁹⁴

The First Department has warned that it will closely scrutinize transactions of this nature to insure that plaintiffs and defendants do not make sham settlements in order to avoid large poundage fees.

BUSINESS CORPORATION LAW

BCL 1312(a): Violation of statute held not jurisdictional in nature.

Section 1312(a) of the Business Corporation Law, a taxing statute, provides that "[a] foreign corporation doing business in this state without authority shall not maintain any action . . . unless and until such corporation has been authorized to do business in this state. . . ."

In *Hot Roll Manufacturing Co. v. Cerone Equipment Co.*,¹⁹⁵ the plaintiff, an unauthorized foreign corporation doing business in New York, obtained a default judgment against the defendant. Thereafter, the defendant initiated an action to vacate the judgment for lack of jurisdiction based on the plaintiff's noncompliance with BCL 1312(a), i.e., failure to obtain the necessary license.

In holding that satisfaction of the section was not a jurisdictional requirement, the Appellate Division, Third Department, construed the statute's language "maintain any action" to be synonymous with "continue any action," rather than with "begin any action."¹⁹⁶ It held that failure to satisfy the requirements of BCL 1312(a) affects legal capacity to maintain an action, but not jurisdiction of such action.¹⁹⁷

Several prior decisions have construed BCL 1312(a) similarly.¹⁹⁸ However, the instant decision is inconsistent with the purpose of BCL 1312(a). It would have been preferable to suspend execution on the judgment until the plaintiff-corporation had qualified to do business in the State.

¹⁹⁴ *Id.* at 230, 328 N.Y.S.2d at 568.

¹⁹⁵ *Id.* 339, 329 N.Y.S.2d 466 (3d Dep't 1972) (3-2).

¹⁹⁶ *Id.* at 341, 329 N.Y.S.2d at 467.

¹⁹⁷ *Id.* at 340, 329 N.Y.S.2d at 467, citing *Wood & Selick v. Ball*, 190 N.Y. 217, 82 N.E. 21 (1907); *Conklin Limestone Co. v. Linden*, 22 App. Div. 2d 63, 253 N.Y.S.2d 578 (3d Dep't 1964).

¹⁹⁸ See, e.g., *Hooton Chocolate Co. v. Star Chocolate Novelties*, 63 Misc. 2d 482, 311 N.Y.S.2d 698 (Sup. Ct. Columbia County 1970); *Oxford Paper Co. v. S.M. Liquidation Co.*, 45 Misc. 2d 612, 257 N.Y.S.2d 395 (Sup. Ct. N.Y. County 1965).